

April 2. 1767.

A N S W E R S

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CHARLES Lord KINNAIRD,

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The PETITION of John Puller tenant in the mill of Haughmuir.

IN the year 1737, the late Lord Kinnaird granted a tack of the mill of Haughmuir, with the multures, suckens, and sequels thereof, to the petitioner, who has possessed the same ever since that period; and of this lease there are still several years to run. The tack does not specify any particular farms as thirled to the mill, but only sets to the petitioner in general the multures, suckens, and sequels, as possessed by the preceding tenants.

The petitioner does not deny, that during the space of ten years he enjoyed the full possession of the whole thirlage, without the least reason of complaint; but alledges, that about the year 1747 some of the tenants of Errol, who were astricted to the pursuer's mill, began to abstract their multures; and on that pretence the petitioner, at his own hand, has retained 20 bolls of meal yearly ever since the respondent succeeded to the estate, which was in the year 1758.

This put the respondent under the necessity of suing the petitioner before his own baron-court; and having there ob-

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tained a decret liquidating the extent of his arrears, he upon that brought an action, and obtained decret against him before the sheriff of Perthshire, in terms of the decret of the barony.

Of this decret the petitioner offered a bill of advocacy; which came in course before Lord Kennet Ordinary; and his Lordship, after hearing parties procurators at full length, pronounced an interlocutor, remitting the cause *simpliciter* to the sheriff. A representation being preferred upon the part of
Feb. 17. 1767. the petitioner, his Lordship, of this date, was pleased to pronounce the following interlocutor.

“ The Lord Ordinary having again considered this representation, with the answers thereto, remits the cause, with these instructions: 1st, That the sheriff find the defender liable for the value of the undelivered bolls, and at the current prices of the respective years for which the undelivered bolls were payable; and, 2^{dly}, That in place of discerning for penalties, he only find the defender liable in the expence of process; and therefore refuses the desire of the said representation.”

Mar. 4. 1767. Against this interlocutor a reclaiming petition was offered on the part of the defender; to which the following answers are submitted on the part of Lord Kinnaird.

The petitioner sets out with this general principle, That tacksmen are intitled to retain part of their tack-duty, “ on the use of the thing hired ceasing;” and to enforce this, he quotes Lord Stair, book 1. tit. 15. par. 2. The words of Lord Stair are, “ Where the use, fruits, and work doth altogether cease, without the fault of the conductor, there the hire must also cease; because the one is given as the cause of the other; and the peril undertaken is not of the being, but of the quantity and value thereof,” &c.

This general principle the respondent will not dispute, and readily agrees with the petitioner, that if Lord Kinnaird had pulled down his mill, or if it had even been destroyed by accident,

cident, he could have had no claim for his rent, unless the mill was again repaired ; as in that case the use of the thing hired would no doubt have ceased, agreeable to the example given by Lord Stair. But the respondent does, with submission, apprehend, that this principle does in no shape apply to the present case. The late Lord Kinnaird put the petitioner in possession of the whole thirlage that belonged to the mill, which possession, by his own acknowledgement, he enjoyed for upwards of ten years. If therefore after so long a period the petitioner allowed any of the tenants to abstract their multures, it was entirely owing to his own negligence ; as it was his business, and not his master's, to maintain that possession after he had been so long established in it ; and it is not pretended, that any person whatsoever has obtained a declarator of freedom from the thirlage.

In case, therefore, any of the tenants abstracted their multures, the petitioner ought to have pursued them ; and he had an easy remedy, by applying to the baron-court of Errol, which was at hand ; and as the whole abstracters resided within that jurisdiction, he might there have pursued them without any trouble or expence.

In order to obviate this, the counsel for the petitioner alleges, that as Mr Crawford had bought the estate of Errol, it was in vain for the petitioner to bring a process against the abstracters, who were his tenants, before that baron-court, as the judgement pronounced in such courts are not to be looked upon as the judgement of the bailie himself, but of his constituent.

Your Lordships however will be informed, that the estate of Errol, and the mill of Haughmuir, have been for above a hundred years in the hands of different proprietors ; and though many of the tenants that are thirled to the mill of Haughmuir have their farms upon the estate of Errol, yet there has been repeated decreets for abstractions given against these tenants in the court of the barony : and there is no
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reason why the petitioner should not have met with equal justice now as formerly. But at any rate, supposing injustice had been there done him, he had an easy remedy, by applying to a superior court.

Lest, however, your Lordships should be of this opinion, the petitioner excuses himself, by alledging, That as Mr Crawford was a gentleman of a considerable estate, and of great influence in that part of the country, he was intimidated to enter into a law-suit with him, or any of his tenants.

This excuse might have had some show of relevancy, had the petitioner lived a few centuries ago, in the midst of some considerable clan in the highlands of Scotland, where it was looked upon as certain ruin and destruction, to attack or disturb any person belonging to it; but will have no great weight with your Lordships, in the present situation.

The petitioner however refutes his own argument; for in the very next paragraph he alledges, That immediately upon the abstractions happening, he raised a process against the abstracters before the sheriff of Perthshire; but that the late Lord Kinnaird refused to produce his title.

This however the respondent does absolutely deny; nor is there the least evidence of any such process ever having been brought. It is further extremely improbable, that the late Lord Kinnaird would refuse to produce his title to confirm his own right, and to assist his tenant in recovering what was so justly due to him. And even supposing he had refused it, the petitioner might easily have recovered it by a diligence. Or, as he had a possessory judgement, Lord Kinnaird's seisin would have been sufficient, of which he might have obtained an extract at the register, without any trouble or expence.

The petitioner further alledged, That in the year 1756 he entered a complaint before the justices of peace of the shire of Perth. To this it was answered on the part of the respondent, That such an action was altogether inept, as the justice of peace court was incompetent to any such action. To this
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it is replied in the petition, That the justice of peace court is very competent, as they have a power of judging in a variety of cases; that their jurisdiction certainly may be prorogated; and no declinature having been offered in the case, they were very competent judges.

In this principle, however, the respondent must beg leave to differ from the petitioner, as he does with submission apprehend, that the jurisdiction of the justices of peace cannot be prorogated to cases of this nature.

It appears to be a maxim in the law of Scotland, That consent alone cannot found a jurisdiction, nor empower a judge to determine any cause to which he has not a radical jurisdiction. The institution of the justices of peace was originally intended to preserve the peace, and regulate the police of the country, and to judge in some small cases, expressly granted to them by particular acts of parliament, beyond the precise bounds of which their limited jurisdiction cannot be extended.

In judging therefore in civil matters, such as the present, they have no radical jurisdiction; and as such by the law of Scotland cannot be prorogated, even by the consent of parties, their judgement in the present case, (supposing they had given one), would have been of itself void and null, agreeable to your Lordships decision the 13th of February 1759, Barlay against Christy.

When therefore the whole proceedings set forth in the petition are examined, it appears, that the petitioner has never taken the proper measures to bring in these abstracters; and that it is by his fault and negligence alone that a possessory judgement is now lost.

The petitioner no sooner applied to the present Lord Kin-
naird, than he readily concurred with him in bringing a prosecution against the abstracters before the sheriff; and for that purpose sent his feisin to instruct his right to the mill: but as it appeared, that the petitioner had allowed the de-

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fenders to abstract for more than seven years, the sheriff could not give judgement in the action. This however could not be imputed to the respondent; but was owing entirely to the petitioner himself, by whose fault and negligence the possessory judgement was lost, and who can never on that account make a handle to retain a considerable part of his rent.

The petitioner, in the *last* place, alledges, That the respondent is precluded from proceeding in this action, as a verbal agreement had been entered into betwixt Lord Kinnaid's doer and the petitioner's, that as they had determined to prosecute the abstracters before the sheriff of Perth, it was agreed, that the claim for arrears should be delayed till the other process was determined.

The respondent does positively deny, that any such agreement was ever made. He readily acknowledges, that upon the petitioner's application, he agreed to concur with him in an action before the sheriff; but as the possessory judgement was lost, the sheriff dismissed the action as incompetent.

The respondent is now, by the fault and negligence of his tenant, put to the expence of raising a process of declarator against the abstracters before this court; in which a long proof has been already led, and a petition on the part of Mr Crawford of Errol and his son presented to your Lordships, for being allowed to compare for their interest in this process; and a diligence has been granted them for recovery of writings, and the cause remitted to the Lord Ordinary; so that it is uncertain when this tedious process may be ended. As the petitioner has allowed the abstractions to go on for the space of twenty years, it may now be much more difficult for the respondent to ascertain his right, than it would have been had his tenant attended to his master's interest, and taken the proper measures for prosecuting the abstracters in due time. So that the petitioner has no very favourable plea in insisting, that this process should be delayed till the action of declarator shall be determined, when it was by his fault alone

alone that the respondent has been put to the trouble and expence of raising such an action.

The respondent does, however, with submission, apprehend, that at any rate there is no necessity for sisting this process till the other shall be determined.

The mill was set to the petitioner, with the multures, fuc-kens, and sequels, in general; and the tack does not specify any particular farms that are thirled to the mill: so that if the defenders should prevail, and obtain a declarator of freedom, their coming to the mill formerly must be understood to be entirely voluntary, and not from any servitude of thirlage; and cannot therefore subject the respondent to any defalcation of his rent. As he only set the mill with the thirlage in general, he cannot be bound to warrant such lands as are not thirled; because the tenants, of their own accord, have been in use to frequent that mill. And the decision, 28th June 1751, Russel against Harrowers, referred to in the petition, does not apply to the present question.

In that case, Lord Burleigh, in the year 1697, granted a charter of the mill of Milnathort, with the multures of the barony of Burleigh and Shanwell, to William and Andrew Harrowers; who, upon that charter, pursued Andrew Horn of Shanwell in a process of declarator of thirlage; Horn defended himself upon a charter of his lands, *tenendas cum molen-dinis, multuris, &c.* granted him by Burleigh's authors in the year 1540; Harrowers being pursued by the factor of Burleigh, brought a suspension of the feu-duties of the subjects evicted; and the Lords found the suspender intitled to an abatement of the feu-duty in proportion to the subjects evicted from them.

This case, however, the respondent apprehends, does in no shape apply to the present. In the decision referred to, Lord Burleigh or his authors granted the same subject to two distinct persons in two separate deeds; and was therefore bound

bound in warrandice, and found liable to the person from whom the subject was evicted.

Lord Kinnaird, in the present case, granted nothing but a tack of the mill, with the multures of the lands that were thirled thereto, and can therefore be bound in nothing further; and should the defenders prevail in the action of declarator, it will thereby appear, that they never have been thirled to the mill; and as they have come of their own accord, their leaving it cannot be said to be an eviction of the thirlage.

And further, whatever may be the event of the process of declarator, it can have no influence upon the petitioner's claim to retain a considerable part of his rents for many years past. He was duly put into possession, and had it for above seven years; so it was his own fault that he did not continue it. No legal eviction has yet happened of any part of the thirl; and if he had done his duty, probably no such eviction would ever have been attempted. It is evidently much more difficult to establish a thirlage after the persons thirled have been allowed to abstract for above twenty years, than it was to maintain the possession which had subsisted past memory of man: and at any rate, any eviction can only intitle him to a claim of deduction of part of his rent falling due after such eviction happens; but cannot intitle him to retain any part of his bygone rents, for which alone the present process proceeds.

In respect whereof, &c.

WILLIAM OLIVER.

